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IN THE

Supreme Court of the United States

October Term, 1972

No. 71-834

ROSALIND MCCLANAHAN, on behalf of herself and all others similarly situated,
Appellant,

vs.

ARIZONA STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

REPLY BRIEF FOR APPELLANT

ARGUMENT

THIS BRIEF IS INTENDED TO REPLY TO APPELLEE'S BRIEF IN FIVE AREAS

1. *Application of the Arizona Enabling Act and of Public Law 280 and Amendments.*

Appellant's opening brief argues that certain federal statutes constitute Congress' continuing recognition of the sovereign independence of reservation Indians from all forms of state control, save those areas specifically ceded (such as 25 U.S.C. §§231, 398). These statutes are the Arizona Enabling Act, 26 Stat. 569 §20 (1910); Public Law 280, 67 Stat. 587 (1953) (codified in part as 18 U.S.C. §1162 and 28 U.S.C. §1360); and the successor to Pub.L. 280, Subchap-

ter III of the Indian Civil Rights Act of 1968, 25 U.S.C. §§1321-1326, 82 Stat. 78-80. Open. Br. pp. 20-24.

Appellee argues that the Arizona Enabling Act is confined merely to protection of Indian land title and has no relation to jurisdiction over persons. Ariz. Br. pp. 15-20. Appellee then contends that Pub.L. 280 has only the "limited purpose" of removing the impediment to state jurisdiction (as to Indian land title) contained in the various Enabling Acts and related state constitutional provisions. *Id.* pp. 20-26. Both of these assertions are incorrect.

This Court has referred to the Enabling Acts as applicable to the question of jurisdiction over persons on Indian reservations. The matter was discussed in *United States v. Chavez,* 290 U.S. 357, 359-60 (1933), involving federal criminal jurisdiction over non-Indians for offenses in Indian country. See also *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685, 687 n. 3 (1965); *Williams v. Lee,* 358 U.S. 217, 222 n. 10 (1959); *Williams v. United States,* 327 U.S. 711, 714 n. 10 (1946).

Public Law 280 makes clear that the Enabling Acts are broader than appellee contends, and it is equally clear that Pub.L. 280 is itself not confined to questions of Indian land title. Sections 1-4 of Pub.L. 280 (18 U.S.C. §1162 and 28 U.S.C. §1360) confer on certain named states (not including Arizona) criminal and civil jurisdiction in Indian country within those states. However, this grant expressly excludes any form of state authority over Indian trust property, real or personal. 18 U.S.C. §1162(b); 28 U.S.C. §1360(b). Sections 6 and 7 of Pub.L. 280, authorizing other states to acquire such jurisdiction, refer back to these provisions. 67 Stat. 590. The amended law as to other states is now 25 U.S.C. §1321-26, with the proprietary exception at 25 U.S.C. §§1321(b), 1322(b).

This proprietary exception has the same scope that appellee assigns to the entire Act. See Ariz. Br. pp. 15-26. If the Enabling Acts have the narrow meaning suggested by appellee, then section 6 of Pub.L. 280 (now 25 U.S.C. §1324) would have nothing to operate on and be completely pointless. And if Pub.L. 280 and its successor have the same narrow meaning, they also would have no purpose. Congress cannot have intended such an empty undertaking. Thus Pub.L. 280 is clearly broader than appellee contends, and the 1953 and 1968 Congresses clearly thought the Enabling Acts to be broader than appellee contends. See also *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971); *Williams v. Lee, supra,* 358 U.S. at 222.

As stated above, appellant's position is that these federal statutes recognized the absence of state jurisdiction over reservation Indians and were enacted to provide a procedure for the states to acquire it, which procedure Arizona has not followed. As argued in the opening brief at p. 17, state jurisdiction on Indian reservations is confined to the affairs of non-Indians unless such affairs infringe on the right of the Indians to govern themselves. However, should this Court disagree with appellant and rule that some measure of state jurisdiction over reservation Indians existed as of 1953 (including jurisidction to tax incomes), then the Court must determine what effect the enactment of Pub.L. 280 had on that jurisdiction.

As a practical matter, the problem is to reconcile Pub.L. 280 and this Court's decisions in *Williams v. Lee, supra,* and *Kennerly v. District Court of Montana, supra.* The latter provides the only significant prior ruling of this Court on the scope of Pub.L. 280.

Appellee argues that *Kennerly* is irrelevant because it dealt "only" with the jurisdiction of state courts over Indi-

ans and not with the application of state laws on reservations. Ariz. Br. p. 25. Apparently the argument is that Pub.L. 280 and its successor are also so limited. However, the statutes negate that interpretation. Pub.L. 280 provides for cession to the states of "jurisdiction over [criminal] offenses committed by or against Indians" in Indian country, "and the criminal laws of such State" shall apply in Indian country. 18 U.S.C. §1162(a); see also 25 U.S.C. §1321(a). Cession of jurisdiction is also provided "over civil causes of action between Indians or to which Indians are parties" in Indian country, "and those civil laws of such State that are of general application to private persons or private property" shall apply in Indian country. 28 U.S.C. §1360(a); see also 25 U.S.C. §1322(a). The statutes plainly refer both to state court jurisdiction and to application of state laws. Also, these statutes treat criminal and civil laws identically, and in the criminal area it is clear that Pub.L. 280 would have to operate on laws as well as courts, to deal with federal criminal statutes such as 18 U.S.C. §§1151-53. This is the law in Arizona. *Application of Denetclaw*, 83 Ariz. 299, 320 P.2d 697 (1958).

The intent of Pub.L. 280 to deal with state civil laws as well as court jurisdiction is further shown by its provision saving as valid any tribal ordinance or custom not inconsistent with state civil law after Pub.L. 280 takes effect. 28 U.S.C. §1360(c); 25 U.S.C. § 1322(c).

Finally, the legislative history of the Indian Civil Rights Act amendments to Pub.L. 280 indicates that it deals with laws as well as court jurisdiction. The principal amendment was the addition of the requirement of Indian consent to assumption of state jurisdiction. 25 U.S.C. §1326. This amendment was in response to Indian complaints about unilateral application of state laws to reservations against the

wishes of the Indians. S.Rep. No. 841, 90th Cong., 1st Sess. p. 11 (1967).

Since Pub.L. 280 applies to state laws as well as state court jurisdiction, so also does the reasoning of its interpretation in *Kennerly v. District Court of Montana, supra.*

Thus if one accepts appellee's position that the states would, in the absence of Pub.L. 280, have some measure of jurisdiction over reservation Indians (including jurisdiction to tax incomes), then one must determine the effect of Pub. L. 280 on such jurisdiction. Appellant suggests that there are three possible interpretations.

One possible interpretation of Pub.L. 280 could have been to provide a procedure for cession to the states of such jurisdiction over Indians as the states would not otherwise have. In other words, a court would first decide if a certain matter is within state jurisdiction pursuant to decisional law such as *Williams v. Lee, supra.* Only if the court determines that the matter is not thus within state jurisdiction would application of Pub.L. 280 be considered. But this interpretation is flatly inconsistent with *Kennerly v. District Court of Montana, supra.* The issue in *Kennerly* was state court jurisdiction over reservation Indians, where the tribal council had acted to confer such jurisdiction on the state. If the "infringement" test of *Williams v. Lee, supra,* is applied to the *Kennerly* situation, it would plainly be a case where the state jurisdiction does not "infringe on the right of the Indians to make their own laws and be governed by them", *Williams v. Lee, supra,* 358 U.S. at 220, and the state would have jurisdiction.[1] This was the reasoning of the Montana

[1]Appellant's position is, of course, that the "infringement" test is not to be applied case by case to reservation Indian affairs. However, appellee's position requires that it be, and it is so applied here for the sake of argument only.

Supreme Court. *State ex rel. Kennerly v. District Court*, 154 Mont. 488, 497, 466 P.2d 85, 90 (1970). Thus if Pub.L. 280 were intended to define state jurisdiction only in situations where the state would not otherwise have jurisdiction (pursuant to decisional law), then the statute would have no application to the *Kennerly* facts. The state would already have jurisdiction pursuant to the tribe's action. Yet this Court reversed the Montana court, ruling Pub.L. 280 to be a "governing act of Congress." *Kennerly v. District Court of Montana, supra*, 400 U.S. at 247. Thus the interpretation of Pub.L. 280 hypothesized at the beginning of this paragraph is negated by *Kennerly*.

A second possible interpretation of Pub.L. 280 is that it provides a procedure for cession to the states of such jurisdiction as the states did not have as of the date of its enactment in 1953, leaving untouched such jurisdiction as they did then have. This interpretation would often have the same result as that in the paragraph above, but it does differ when applied to the *Kennerly* facts. In *Kennerly* the tribal council law conferring jurisdiction on the Montana courts was passed in 1967, well after 1953. Thus under this second interpretation of Pub.L. 280, the statute would govern, and the state would acquire no jurisdiction absent compliance with it. This is the only interpretation of Pub.L. 280 which could support appellee's position in the instant case and also be consistent with *Kennerly, supra*.

This interpretation has two variants: (1) Pub.L. 280 must be obeyed to acquire jurisdiction after 1953 unless the state *could have* exercised such jurisdiction before that time, or (2) Pub.L. 280 must be obeyed to acquire jurisdiction after 1953 unless the state *actually* exercised jurisdiction in a permissible area prior to 1953. The general tenor of *Kennerly* favors the latter; *Kennerly* seems to say that Pub.L. 280 occupies the acquisition field after its enactment. This interpre-

tation, coupled with a ruling that Arizona could have exercised its taxing jurisdiction prior to 1953 under the test of *Williams v. Lee*, would require a remand to determine if Arizona actually had done so.

For the state to prevail, either variant requires this Court to decide if Arizona had jurisdiction to tax as of 1953. This would be a most awkward and unworkable standard. In each area of jurisdiction a determination would have to be made as to the state of the law in 1953. Furthermore, the court below stated that "the amount of tribal government in existence" is relevant to application of the *Williams v. Lee* infringement test. Jurisd. Statement p. 4a; 14 Ariz. App. at 454; 484 P.2d at 223. If so, the Pub.L. 280 inquiry would also require a determination of the extent of each particular tribe's government in existence in 1953.

A third possible interpretation of Pub.L. 280 is that it was intended to occupy completely the field of state jurisdiction over reservation Indian affairs (again save for specific cessions like 25 U.S.C. §231). Whether or not the states had any jurisdiction over Indians on reservations in 1953, they can subsequently exercise jurisdiction of any sort only by complying with Pub.L. 280. This interpretation is fully consistent with *Kennerly* and also with the concern of Congress in 1953 that states acquiring jurisdiction over Indians provide the services to Indians being provided by the federal government. H.R. Rep. No. 848, 83d Cong., 1st Sess. pp. 6-8 (1953); 1953 U.S. Code Cong. & Admin. News. pp. 2412-14. This interpretation of Pub.L. 280 would, of course, require reversal of the instant case, because Arizona has not complied with Pub.L. 280. On that basis the interpretation is advocated by the Brief of the Navajo Tribe of Indians, as Amicus Curiae, in Support of Jurisdictional Statement dated January 21, 1972. A recent law review article also

concludes that this interpretation is correct. J. Sullivan, *State Civil Power over Indians*, 33 Mont. L. Rev. 291, 302-306 (1972). Appellant submits that, should this Court reach this question, this interpretation should be adopted, because it is the only interpretation providing a workable rule that is consistent with *Kennerly*.[3]

Appellant further submits that the analysis above shows appellant's basic position on the proper interpretation of *Williams v. Lee, supra*, to be correct. The version of the *Williams* test advocated by Arizona is manifestly unworkable. It leads to litigation in cases involving every area of the legal affairs of reservation Indians, at least every area where a state may see some advantage to the assertion. And as explained above, the problem is further compounded by the need to reconcile the *Williams* test with Pub.L. 280 as interpreted in *Kennerly*. Such a mischievous state of affairs cannot have been intended by this Court in formulating the *Williams* test. This Court should now clear the air by restating *Williams v. Lee* as meaning that state laws have no application to the on-reservation affairs of Indians (save the area of specific cessions like 25 U.S.C. §231), and that the "infringement" test is to be employed only to determine the application of state laws to non-Indians on Indian reservations. *Cf., Thomas v. Gay*, 169 U.S. 264 (1898). This read-

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[3]It may be objected that this interpretation would have been available to the Court in *Williams v. Lee, supra*. However, the point was not considered in that case (it did not have to be), and there is no reason why the *Kennerly* rationale could not have been an alternate ground of decision in Williams. The result would have been the same.

It may also be argued that this interpretation in effect eliminates the *Williams* "infringement" test as viable law and thus implicitly cancels that decision. However, this is not necessarily so. Pub.L. 280 is confined to jurisdictional matters involving Indians. Matters involving non-Indians on Indian reservations would still be decided by the *Williams* test—they would be subject to state jurisdiction unless infringing on the right of the Indians to govern themselves. This is, of course, appellant's position on *Williams* anyway. Open. Br. p. 17.

ing of *Williams* would avoid the difficulties of all three interpretations of Pub.L. 280 discussed above and assign to Pub. L. 280 its natural meaning: providing a procedure for cession to the states of the otherwise exclusive federal/tribal jurisdiction over reservation Indian affairs.

2. *Provision of Government Services.*

Appellee argues that Arizona's provision of state services to reservation Indians and their enjoyment of certain state rights require that Arizona have jurisdiction to levy the tax here at issue. Two contentions are made: (A) Reservation Indians are entitled to state services and privileges, because denial of these would violate the Equal Protection Clause; thus their nonliability for taxes to pay for those services would deny other citizens Equal Protection. Ariz. Br. 35-38. (B) Navajo Indians are now actually receiving services from and privileges in Arizona, and it would be inequitable for them to enjoy benefits without bearing a share of the burdens. Ariz. Br. 34-35.

As stated in the opening brief, appellant's position is that the furnishing of state services and the enjoyment of state privileges is not relevant to the legal question of state jurisdiction over reservation Indian affairs. Open. Br. p. 24. The issue is within the plenary power of Congress, and Congress has by treaty and statute recognized and protected the sovereign right of reservation Indians to self-government free of state interference. Open. Br. pp. 8-24; see also *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 686 (1965). In Pub.L. 280, Congress has provided a method for state acquisition of jurisdiction over reservation Indians, which method Arizona has declined to follow, "possibly because the people of the State anticipate that the

burdens accompanying such power might be considerable." *Williams v. Lee, supra,* 358 U.S. at 223.[8]

However, even if state benefits and privileges are deemed relevant to the issue here, appellee's argument will not withstand analysis.

A. *Equal Protection Clause.*

Two state courts have ruled that reservation Indians are citizens of the state in which their reservation lies and as such are entitled to state services. (Both decisions deal with welfare payments.) *State Board of Public Welfare v. Board of Commissioners,* 262 N.C. 475; 137 S.E.2d 801 (1964); *Acosta v. San Diego County,* 126 Cal.App.2d 455, 272 P.2d 92 (1954). The *Acosta* case expressly held that denial of services would violate the Equal Protection Clause of the Fourteenth Amendment. The Arizona Supreme Court has similarly decided that a Navajo Indian is entitled to a resident fishing license. *Begay v. Sawtelle,* 53 Ariz. 304, 88 P.2d 999 (1939). Arizona has also ruled that reservation Indians are entitled as citizens of the state to vote, serve on juries, and incorporate. See decisions cited at Ariz. Br. pp. 36-37.

Appellant knows of no modern case to the contrary of those above, nor of any authoritative federal decisions at all on the issue. Whether reservation Indians would be entitled to every state service as a matter of Equal Protection may be questioned in light of this Court's statement in *Warren*

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[8]In *Oklahoma Tax Com'n v. United States,* 319 U.S. 598 (1943), this Court referred to state benefits in an Indian tax case. But the Indians there did not live on a reservation, and the reservation situation was expressly distinguished. 319 U.S. at 602-3. Furthermore, the continuing viability of a major part of that decision is questionable in light of *Squire v. Capoeman,* 351 U.S. 1 (1956). See *Mason v. United States,* ——F.2d—— (Ct. Cl. No. 417-70, June 16, 1972); *United States v. Daney,* 370 F.2d 791 (10th Cir. 1966).

Trading Post Co. v. Arizona Tax Commission, supra, 380 U.S. at 690-691:

> Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. And in compliance with its treaty obligations the Federal Government has provided for roads, education and other services needed by the Indians.
>
> * * *
>
> And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

Despite this statement, appellant contends that the cases holding Indians entitled to state services and privileges as a matter of Equal Protection are correct. Indians are citizens, 8 U.S.C. §1401(a) (2), and entitled to all rights of citizenship. They are included in the state's population for apportionment of representation in Congress, 57 I.D. 195 (1940), so that denial of their right to vote would clearly be unlawful. *Cf. Wesberry v. Sanders,* 376 U.S. 1 (1964). This Court's statement in *Warren* quoted above merely observed that the federal policy of providing for the Navajos relieves the state of the obligation to provide services as a practical matter. As will be set out below, that is very much the case.

However, appellee's argument that Indian entitlement to state services coupled with non-liability for taxes constitutes a denial of Equal Protection to other Arizona citizens is not a correct statement of the law. This Court has ruled that Indian citizenship is not inconsistent with continued federal

protection. *Creek County v. Seber*, 318 U.S. 705, 718 (1943). In that case this Court expressly ruled that an Indian tax exemption is Constitutional. *Id.* at 715. That the exemption might "possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress, not the courts." *Id.* p. 718. It should be noted that the Indians involved there did not live on a reservation and enjoyed a full measure of state services. *Oklahoma Tax Commission v. United States, supra*, 319 U.S. at 609. Thus appellant's nonliability for the tax here at issue does not deny anyone Equal Protection. See also *Simmons v. Eagle Seelatsee*, 244 F.Supp. 808 (E.D. Wash., 1965), *aff'd per curiam*, 384 U.S. 209 (1966); *cf., Gray v. United States*, 394 F.2d 96 (9th Cir.) *cert. denied*, 393 U.S. 985 (1968).

(B) *Actual Provision of Services to Navajos.*

The opinion of the Court below recites an alleged concession on oral argument by appellant's counsel that Arizona funds are expended for Navajo education and welfare on the Navajo Reservation. See also Ariz. Br. p. 34. Apparently the argument is that it would be inequitable for the Indians to receive services and not to pay taxes.

But of course Arizona is entitled to and does collect substantial tax revenues from Reservation sources. Congress has authorized the state to tax the production of Indian-owned minerals on reservations. 25 U.S.C. §§398, 398c. (There is considerable mineral production on the Navajo Reservation. See, *e.g.*, Chairman's Quarterly Rpt. to the Navajo Tribal Council, Fall Session, Nov. 1971, pp. 61-63.) Where non-Indians are using Indian reservation resources, the state can tax the non-Indian interest in the Indian property. *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir.) *cert. denied*, 404 U.S. 817 (1971); cases cited at Open. Br. pp. 14-15. And of

course non-Indians using the reservation are taxable on their own property. *Thomas v. Gay*, 169 U.S. 264 (1898). Also, the large Indian Service expenditures by the federal government and those by the Navajo Tribe itself (see discussion below) indirectly contribute large sums to Arizona tax authorities. The large numbers of non-Indians employed by the Tribe and the federal government pay Arizona taxes. The reservation is seriously underdeveloped, and thus both the Tribe and individual Indians make large purchases off the reservation in Arizona, from merchants who pay state taxes. And Indians attract millions of tourist dollars to Arizona.

For the reasons just outlined, a determination that the existing limited enjoyment of state services by Navajos is somehow "inequitable" would require a detailed factual inquiry as to just where the equities lie. This case is here on a motion to dismiss. No pleading of record raises this issue. If a factual inquiry of this sort were relevant, it would call for a remand to allow development of the facts. *Sears, Roebuck & Co. v. Metropolitan Engravers*, 245 F.2d 67 (9th Cir. 1957); *Grand Opera Co. v. Twentieth Century Fox Film Corp.*, 235 F.2d 303 (7th Cir. 1956); *Holmberg v. Williamson*, 21 Fed. Rules Serv. 63 (S.D.N.Y. 1955).

Appellant suggests that such a factual inquiry would show that Arizona receives far more than she gives. In the welfare field, 80% of the state's share of categorical aid is paid by the federal government. 25 U.S.C. §639. General assistance is furnished by the Bureau of Indian Affairs pursuant to 25 U.S.C. §13, *Ruiz v. Morton*, —— F.2d —— (9th Cir. No. 25568, May 31, 1972), and by the Tribe itself. 13 N.T.C. Part 2.[4] In the field of education, the BIA provides most of the support for its boarding schools and for

[4]Citations to N.T.C. refer to the Navajo Tribal Code (1969).

vocational education pursuant to 25 U.S.C. §§13, 309, 309a. The majority of support for public schools on the Navajo Reservation comes from federal sources. 25 U.S.C. §§252-54; 20 U.S.C. §§236-244, 631-644. Other support comes from local taxation of real property interests located on the Reservation. (See discussion above at p. 12). The Tribe itself supports education on the Reservation. Tit. 10 N.T.C. Arizona provides support only to public schools on the Reservation and only a minority of that support. And, of course, the Reservation schools educate many non-Indian children whose families pay Arizona taxes.

Most government services on the Reservation are provided by either the federal government or the Tribal government. *Cf., Warren Trading Post Co. v. Arizona Tax Commission, supra,* 380 U.S. 691 n. 17. In addition to the areas named in the last paragraph, the federal government pays almost all health services costs. 42 U.S.C. §§2001-2005f. The rest of the public support is Tribal. Tit. 13 N.T.C. All roads are fully federally financed. 23 U.S.C. §§201-203; 25 U.S.C. §318a. Development of water supplies and sanitation systems is federally financed. 42 U.S.C. §2004a. Felony prosecutions are in federal district courts by the United States Attorney. 18 U.S.C. §1153.

All other courts serving Indians are supported directly by the Navajo Tribe. Tit. 7 N.T.C. The Tribe maintains its own police force. 17 N.T.C. ch. 9. Both courts and police also serve some off-reservation Navajos (concurrently with the state) who do pay state taxes. 7 N.T.C. §§133-134. The Tribe pays its own governmental costs. Tit. 2 N.T.C. It maintains a public housing program and engages in zoning and land planning. 6 N.T.C. ch. 5, 9. It also provides a long

list of regulatory services normally provided by state and local governments.[5]

The discussion in this section shows the great complexity of the economic relationship between self-governing Indian reservations and the states in which they lie. For the Navajos, the complexity is tripled, because the Reservation is in three different states. This complexity is one of the reasons courts have always left adjustment of the relationship to the plenary control of Congress. See *Creek County v. Seber, supra,* as quoted above at p. 12. In Pub.L. 280, Congress has offered the states the opportunity to take over most governmental supervision of Indian reservations, but only by also assuming the obligation of support now borne by the federal government. *Williams v. Lee, supra,* 358 U.S. at 223. As already stated, this obligation was one concern of Congress in enacting Pub.L. 280.[6] Arizona is attempting an end run around this obligation. It is Arizona, and not the Navajos, which seeks something for nothing.

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[5]A partial list includes: control, branding and inspection of livestock, 3 N.T.C. ch. 7, 13; business licensing, 5 N.T.C. ch. 7; tourism reg., 5 N.T.C. §11 (c) (1); licensing of common carriers, 5 N.T.C. ch. 13; reg. of signs, billboards and advertising devices, 5 N.T.C. ch. 15; reg. of slaughterhouses, restaurants, trading posts, trailer courts, dogs, burials, contagious diseases, day care centers, nursing homes, and midwives, 13 N.T.C. Part 1; highway and traffic reg., Tit. 14 N.T.C.; labor reg., Tit. 15 N.T.C.; mines and minerals, Tit. 18 N.T.C.; parks, Tit. 19 N.T.C.; professions and occupations, Tit. 20 N.T.C.; public utilities and communications, Tit. 21 N.T.C.; water, Tit. 22 N.T.C.; conservation, forestry and wildlife, Tit. 23 N.T.C.

[6]H.R.Rep. No. 848, 83d Cong., 1st Sess. pp. 6-8 (1953); 1953 U.S. Code Cong. & Adm. News pp. 2412-14. Some states wanted federal subsidies before accepting governmental responsibilities in Indian country. *Id.* This problem was still around as Congress considered the 1968 Amendment to Pub.L. 280. Senator Ervin stated, "Some States claim tfiat Public Law 280 imposes too great a financial burden and that subsidies from the Federal Government are needed if the States are adequately to enforce law on the reservation" *Hearings on S.961-968 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. p. 4 (1965).

Finally, appellee labels the Navajos a "privileged class." Ariz. Br. p. 40. This remark displays a woeful ignorance of the economic and social situation of most reservation Indians. The tax base of the Reservation is a meager enough resource for the Tribe as it is, without Arizona invading it. See *Warren Trading Post Co. v. Arizona Tax Commission, supra,* 380 U.S. at 691.

3. *The Buck Act.*

Appellee argues that the Buck Act, 4 U.S.C. §§105-110, "was never intended" to apply to Indian reservations. Ariz. Br. p. 26. Later on that page this Court's decision in *Warren Trading Post Co. v. Arizona Tax Commission, supra,* is cited in support of the argument. The reference is presumably to 380 U.S. at 691 n. 18. This footnote supports the assertion, but it does so only in the alternative. See last sentence of the footnote. The footnote in turn refers to a dictum in *Your Food Stores, Inc. v. Village of Espanola,* 68 N.M. 327, 361 P.2d 950 *cert. denied,* 368 U.S. 915 (1961)[7]. However, as pointed out in appellant's opening brief at p. 27, both *Warren Trading Post* and the New Mexico case dealt with taxation of non-Indians on Indian reservations, and neither interpreted 4 U.S.C. §109. The New Mexico court interpreted 4 U.S.C. §110(e), defining the areas of application of the Buck Act, as excluding Indian reservations. 68 N.M. at 334, 361 P.2d at 955-56. But if this were correct, why did Congress bother to include the express Indian exemption in 4 U.S.C. §109? If *reservations* were to be exempted rather than Indians, Congress would in all probability have placed the express exemption as an exception to 4 U.S.C. §110(e).

[7]The Buck Act tax ruling in that case is dictum—or at best an alternate holding as to a minor part of the case—because the New Mexico Court's principal ruling, that Espanola could not annex Indian reservation land, was sufficient to deny the Village any jurisdiction to levy a tax.

The legislative history makes clear what happened. As appellee points out, the Interior Department sought to have Indian reservations excepted from the Act. Ariz. Br. p. 26. But vigorous objection to that proposal, on the ground that it would make Indian reservations tax havens for non-Indian businesses, led to adoption by Congress of 4 U.S.C. §109 rather than the Interior proposal cited by appellee. See discussion and quoted material at Open. Br. p. 26. Thus the Buck Act did intend to deal with taxing jurisdiction on Indian reservations, and it specifically exempted Indians from state income tax.

This discussion points up the fallacy in another of appellee's arguments. At pp. 40-41, appellee suggests that Indian reservations could become bases for a massive tax avoidance scheme and for "ruinous competition" to off-reservation businesses. Not only does the argument ignore the use tax, which is aimed at just such situations interstate, but it implies that Indian tax exemptions can be claimed by non-Indians using Inidan reservations. That very concern led to the precise language of 4 U.S.C. §109 exempting Indians only. See also *Warren Trading Post Co. v. Arizona Tax Commission, supra,* 380 U.S. at 691-692:

> Insofar as they are applied to this federally licensed Indian trader *with respect to sales made to reservation Indians on the reservation,* these state laws imposing taxes cannot stand. (emphasis added).

4. *Jurisdiction Cases Relied on by Appellee.*

Appellee relies on *New York ex rel. Ray v. Martin,* 326 U.S. 496 (1946); *Draper v. United States,* 164 U.S. 240 (1896); and *United States v. McBratney,* 104 U.S. 621 (1882). Ariz. Br. pp. 12, 17. The inapplicability of those decisions, which did not involve Indians, is adequately dealt

with at opening brief pp. 12-14. However, appellant wishes to add to the authorities there *Mull v. United States*, 402 F.2d 571, 573 (9th Cir. 1968), *cert. denied*, 393 U.S. 1107 (1969), where the Ninth Circuit recognized the peculiarity of those decisions.

Appellee also relies on *Vermillion v. Spotted Elk*, 85 N.W.2d 432 (N.D. 1957), where North Dakota upheld state court jurisidction over a reservation tort involving Indians. However, that decision pre-dated *Williams v. Lee*, *supra*, and it has been distinguished or repudiated by subsequent state court decisions. *Sigana v. Bailey*, 282 Minn. 367, 164 N.W.2d 866 (1969); *Smith v. Temple*, 82 S.D. 560, 152 N.W.2d 547 (1967); *Valdez v. Johnson*, 68 N.M. 476, 362 P.2d 1004 (1961). It is no longer the law in North Dakota, having been legislatively overruled. *In re Whiteshield*, 124 N.W. 2d 694 (N.D. 1963).

Appellee relies on *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). Because it dealt with Indians not on a federal reservation, the decision has no application to reservation issues. *Donahue v. Justice Court*, 15 Cal.App.3d 557, 563, 93 Cal. Rptr. 310, 314 (1971), *cert. denied*, 404 U.S. 990 (1971). The importance of the difference is shown by its companion case, *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), where reservation Indian fishing rights were held to be under federal/tribal authority even in a state where Pub.L. 280 is applicable.[8]

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[8]Appellant disagrees with the statement in the Brief for Amicus Curiae, National Congress of American Indians at p. 12 that state fishing laws were help to apply to reservation Indians in *Metlakatla*. The case held that the Secretary of the Interior had jurisdiction to the exclusion of the state. (The Metlakatla Reservation is unique in the respect that Congress had delegated its plenary authority to the Secretary of the Interior. 369 U.S. at 53.)

5. *Taxation Cases Relied on by Appellee.*

Appellee relies on *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) and *Sims v. United States*, 359 U.S. 108 (1959). The former upheld state income taxes on federal employees and the latter upheld a federal levy on a state government to enforce the federal income tax against state employees. As pointed out in opening brief pp. 18-19, *Graves* denied an attempt to claim a tax exemption based on the source of the income. There was no question that the state had jurisdiction over the taxpayer. Appellant here does not claim an exemption based on the source of her income but on the lack of state jurisdiction over her.

It should be noted that the *Graves* decision pre-dated the enactment of the Buck Act. Thus even though *Graves* allowed states to tax the incomes of federal employees, it was still necessary for Congress to enact the Buck Act to allow states to tax the income of anyone (federal employee or not) residing and working within a federal enclave. In fact, one of the motives for the Buck Act was the inequality between two federal employees with identical jobs, one living off a federal reservation and paying state taxes, the other living on and exempt. (The example used was two Annapolis professors.) *Hearings on H.R. 6687 Before a Subcomm. of the Senate Comm. on Finance*, 76th Cong., 3d Sess. (Apr. 23, 1940) at p. 15.

Sims v. United States, supra, is a further indication of the error of the court below in its attempt to separate the tax here as "personal" from the affairs of the Navajo Tribe. See discussion at Open. Br. p. 19. As appellee apparently admits (at Ariz. Br. pp. 28-29), jurisdiction to tax appellant would lead to attempts to sue the Navajo Tribe (where its employees are concerned) to collect the tax.

Appellee points out that reservation Indians are subject to the federal income tax. Ariz. Br. p. 29. However, federal authority over reservation Indians is unquestioned. To reason from that to state authority flies in the face of numerous decisions of this Court. Such reasoning is attempted at appellee's brief p. 30, but the citation following the argument shows that it traces to the many cases in this Court ruling on the taxability or not of inheritance of, or income from, Indian trust allotments and other trust property derived from allotments. In the case of such property, tax exemption has been claimed on the basis of the federal allotment statutes, not on reservation situs, because many of the lucrative, mineral-rich allotments are located off Indian reservations in Oklahoma. Two such decisions are relied on by appellee: *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943) and *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936). The history of these cases and the possibility that the two cases just cited have been implicitly limited or overruled by *Squire v. Capoeman*, 351 U.S. 1 (1956), are discussed at length in the Jurisdictional Statement, pp. 14-15, the Briefs for Amici Curiae, National Congress of American Indians and Estate of Rose Mason, Deceased. It is appellant's position that these cases, depending solely on construction of the specific allotment statutes, have no relevance to the instant case. (Many of these same allotment statutes are cited by appellee's brief at p. 11 n. 1.)

Appellee cites two New York state cases allowing state income taxation of reservation Indians. Ariz. Br. p. 32. However, New York was ceded jurisdiction over reservation Indians by 25 U.S.C. §§232-33, statutes similar in effect to Pub.L. 280 discussed above.

Appellee cites *Silas Mason Co. v. Tax Commission*, 302 U.S. 186 (1937) and *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930). Both cases dealt only with state taxation

of non-Indians doing business on Indian reservations. No issue of that sort is present here. Appellee also argues that this Court's pre-emption ground of decision in *Warren Trading Post Co. v. Arizona Tax Commission, supra,* by implication constitutes a recognition by the Court that Arizona would otherwise have jurisdiction to tax. Not only is that fallacious reasoning, but *Warren* again dealt with taxation of a non-Indian company doing business on an Indian reservation. Also, this Court expressly reserved the Constitutional question. 380 U.S. at 686.

Respectfully submitted,

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Dated: September 14, 1972

OPINION

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

McCLANAHAN *v.* ARIZONA STATE TAX COMMISSION

APPEAL FROM THE COURT OF APPEALS OF ARIZONA, DIVISION ONE

No. 71–834. Argued December 12, 1972—Decided March 27, 1973

The State of Arizona has no jurisdiction to impose a tax on the income of Navajo Indians residing on the Navajo Reservation and whose income is wholly derived from reservation sources, as is clear from the relevant treaty with the Navajos and federal statutes. Pp. 4–18.

14 Ariz. App. 452, 484 P. 2d 221, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

14 Ariz. App. 452, 484 P. 2d 222 (1971). We noted probable jurisdiction, 406 U. S. 916 (1972), and now reverse. We hold that by imposing the tax in question on this appellant, the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves. The tax is therefore unlawful as applied to reservation Indians with income derived wholly from reservation sources.

I

Appellant is an enrolled member of the Navajo tribe who lives on that portion of the Navajo reservation located within the State of Arizona. Her complaint alleges that all her income earned during 1967 was derived from within the Navajo reservation. Pursuant to Ariz. Rev. Stat. § 43–188 (f), $16.20 were withheld from her wages for that year to cover her state income tax liability.[3] At the conclusion of the tax year, appellant filed a protest against the collection of any taxes on her income and a claim for a refund of the entire amount withheld from her wages. When no action was taken on her claim, she instituted this action in Arizona Superior Court on behalf of herself and those similarly situated, demanding a return of the money withheld and a declaration that the state tax was unlawful as applied to reservation Indians.

[3] The liability was created by Ariz. Rev. Stat. § 43–102 (a) which, in relevant part, provides: "There shall be levied, collected, and paid for each taxable year upon the entire net income of every estate or trust taxable upon this title and of every resident of this state and upon the entire net income of every nonresident which is derived from sources within this state, taxes in the following amounts and at the following rates upon the amount of net income in excess of credits against net income provided in §§ 43–127 and 43–128." Appellant conceded below that she was a "resident" within the meaning of the statute, and that question, which in any event poses an issue of state law, is not now before us.

The trial court dismissed the action for failure to state a claim, and the Arizona Court of Appeals affirmed. Citing this Court's decision in *Williams* v. *Lee*, 358 U. S. 217 (1959), the Court of Appeals held that the test "is not whether the Arizona state income tax infringes on plaintiff's rights as an individual Navajo Indian, but whether such a tax infringes on the rights of the Navajo tribe of Indians to be self-governing." 14 Ariz. App., at 454, 484 P. 2d, at 223. The Court thus distinguished cases dealing with state taxes on Indian real property on the ground that these taxes, unlike the personal income tax, infringed tribal autonomy.

The Court then pointed to cases holding that state employees could be required to pay federal income tax and that the State had a concomitant right to tax federal employees. See *Helvering* v. *Gerhardt*, 304 U. S. 405 (1938); *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939). Reasoning by analogy from these cases, the Court argued that Arizona's income tax on individual Navajo Indians did not "[cause] an impairment of the right of the Navajo tribe to be self-governing." 14 Ariz. App., at 455, 484 P. 2d, at 224.

Nor did the Court find anything in the Arizona Enabling Act, 36 Stat. 557, to prevent the State from taxing reservation Indians. That Act, the relevant language of which is duplicated in the Arizona Constitution, disclaims state title over Indian lands and requires that such lands shall remain "under the absolute jurisdiction and control of the Congress of the United States." 36 Stat. 569. But the Arizona court, relying on this Court's decision in *Organized Village of Kake* v. *Egan*, 369 U. S. 60 (1962), held that the Enabling Act nonetheless permitted concurrent state jurisdiction so long as tribal self-government remained intact. Since an individual income tax did not interfere with tribal self-government, it followed that appellant had failed to state a claim. The

Arizona Supreme Court denied a petition for review of this decision, and the case came here on appeal. See 28 U. S. C. § 1257 (2).

II

It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government. See, *e. g.*, *Organized Village of Kake* v. *Egan*, 369 U. S. 60 (1962); *Metlakatla Indian Community* v. *Egan*, 369 U. S. 45 (1962); *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598 (1943). Nor are we concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations. See, *e. g.*, *Thomas* v. *Gay*, 169 U. S. 264 (1898); *Utah Northern R. Co.* v. *Fisher*, 116 U. S. 28 (1885). Cf. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 651 (1930). Nor, finally, is this a case where the State seeks to reach activity undertaken by reservation Indians on nonreservation lands. See, *e. g.*, *The Mescalaro Apache Tribe* v. *Jones*, *post*. Rather, this case involves the narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation.

The principles governing the resolution of this question are not new. On the contrary, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U. S. 786, 789 (1945). This policy was first articulated by this Court 140 years ago when Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only

acknowledged but guarantied by the United States." *Worcester* v. *Georgia*, 31 U. S. (6 Pet.) 515, 557 (1832). It followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries. "The Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States." *Worcester* v. *Georgia*, *supra*, at 561. See also *United States* v. *Kagama*, 118 U. S. 375 (1886); *Ex parte Crow Dog*, 109 U. S. 556 (1883).

Although *Worcester* on its facts dealt with a State's efforts to extend its criminal jurisdiction to reservation lands,[4] the rationale of the case plainly extended to state taxation within the reservation as well. Thus, in *The Kansas Indians*, 72 U. S. (5 Wall.) 737 (1867), the Court unambiguously rejected state efforts to impose a land tax on reservation Indians. "If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority." 72 U. S., at 755. See also *The New York Indians*, 72 U. S. (5 Wall.) 761 (1867).

[4] See also *Williams* v. *United States*, 327 U. S. 711 (1946); *United States* v. *Chavez*, 290 U. S. 357 (1933); *United States* v. *Ramsey*, 271 U. S. 467 (1926).

It is true, as the State asserts, that some of the later Indian tax cases turn not on the Indian sovereignty doctrine, but on whether or not the State can be said to have imposed a forbidden tax on a federal instrumentality. See, *e. g.*, *Leahy* v. *State Treasurer of Oklahoma*, 297 U. S. 420 (1936); *United States* v. *Rickert*, 188 U. S. 432 (1903). To the extent that the tax exemption rests on federal immunity from state taxation, it may well be inapplicable in a case such as this involving an individual income tax.[5] But it would vastly oversimplify the problem to say that nothing remains of the notion that reservation Indians are a separate people to whom state jurisdiction, and therefore state tax legislation, may not extend. Thus, only a few years ago, this Court struck down Arizona's attempt to tax the proceeds of a trading company doing business within the confines of the very reservation involved in this case. See *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U. S. 685 (1965). The tax in no way interfered with federal land or with the National Government's proprietary interests. But it was invalidated nonetheless because "from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference." 380 U. S., at 686–687.[6] As a leading text on Indian problems

[5] The federal instrumentality doctrine does not prohibit state taxation of individuals deriving their income from federal sources. See *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939). Cf. *Leahy* v. *State Treasurer of Oklahoma*, 297 U. S. 420 (1936). The doctrine has, in any event, been sharply limited with respect to Indians. See *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598 (1943).

[6] The Court below distinguished *Warren Trading Post* as limited to cases where the Federal Government has preempted state law by regulating Indian traders in a manner inconsistent with state taxation. See 14 Ariz. App., at 455, 484 P. 2d, at 224. But although the Court was, no doubt, influenced by the federal licensing require-

summarizes the relevant law "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress." United States Department of Interior, Federal Indian Law 845 (1958) [hereinafter cited as Federal Indian Law].

This is not to say that the Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of state law, has remained static during the 140 years since *Worcester* was decided. Not surprisingly, the doctrine has undergone considerable evolution in response to changed circumstances. As noted above, the doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See, *e. g., Oklahoma Tax Commission* v. *United States*, 319 U. S. 598 (1943). Similarly, notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians. See, *e. g., New York ex rel. Ray* v. *Martin*, 326 U. S. 496 (1946); *Draper* v. *United States*, 164 U. S. 240 (1896); *Utah & Northern R.* v. *Fisher*, 116 U. S. 28 (1885). This line of cases was summarized in this Court's landmark decision in *Williams* v. *Lee*, 358 U. S. 217 (1959): "Over the years this Court has modified [the *Worcester* principle] in cases where

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ments, the reasoning of *Warren Trading Post* cannot be so restricted. The Court invalidated Arizona's tax in part because "Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities." *Warren Trading Post Co.* v. *Arizona Tax Commission*, *supra*, at 690.

essential tribal relations were not involved and where the right of Indians would not be jeopardized . . . . Thus, suits by Indians against outsiders in state courts have been sanctioned. . . . And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. . . . But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive. . . . Essentially, absent governing Acts of Congress, the question has always been whether the state action infringes on the right of reservation Indians to make their own laws and be ruled by them." 358 U. S., at 219–220 (footnote omitted).

Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption.[7] See *The Mescalero Apache Tribe* v. *Jones*, *post*. The modern cases thus tend to avoid reliance on Platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. Compare, *e. g.*, *United States* v. *Kagama*, 118 U. S. 375 (1886), with *Kennerly* v. *District Court*, 400 U. S. 423 (1971).[8]

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[7] The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making. See U. S. Const. Art. I, § 8, cl. 3; Art. II, § 2, cl. 2. See also *Williams* v. *Lee*, 358 U. S. 217, 219 n. 4 (1959); *Perrin* v. *United States*, 232 U. S. 478, 482 (1914); Federal Indian Law 3.

[8] The extent of federal preemption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question. Cf. *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 62 (1962); Federal Indian Law 846. The question is generally of little more than theoretical importance, however, since in almost all cases, federal treaties and statutes define the boundaries of federal and state jurisdiction.

The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens.[9] They have the right to vote,[10] to use state courts,[11] and they receive some state services.[12] But it is nonetheless still true, as it was in the last century, that "[t]he relation of the Indian tribes living within the borders of the United States [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they

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[9] See 8 U. S. C. § 1401 (a) (2).

[10] See, *e. g.*, *Harrison* v. *Laveen*, 67 Ariz. 337, 196 P. 2d 456 (1948).

[11] See, *e. g.*, *Felix* v. *Patrick*, 145 U. S. 317, 332 (1892).

[12] The Court below pointed out that Arizona was expending tax monies for education and welfare within the confines of the Navajo reservation. See 14 Ariz. App., at 456–457, 484 P. 2d, at 225–226. It should be noted, however, that the Federal Government defrays 80% of Arizona's ordinary social security payments to reservation Indians, see 25 U. S. C. § 639, and has authorized the expenditure of more than $88 million for rehabilitation programs for Navajos and Hopis living on reservations. See also 25 U. S. C. §§ 13, 309, 309a. Moreover, "[c]onferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization." *The Kansas Indians*, 72 U. S. (5 Wall.) 737, 757 (1867).

reside." *United States* v. *Kagama*, 118 U. S. 375, 381–382 (1886).

III

When the relevant treaties and statutes are read with this tradition of sovereignty in mind, we think it clear that Arizona has exceeded its lawful authority by attempting to tax appellant. The beginning of our analysis must be with the treaty which the United States Government entered with the Navajo nation in 1868. The agreement provided, in relevant part, that a prescribed reservation would be set aside "for the use and occupation of the Navajo tribe of Indians" and that "no persons except those herein authorized to do, and except such officers, soldiers, agents, and employes of the government, or of the Indians, as may be authorized to enter Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." 15 Stat. 667, 668 (1868).

The treaty nowhere explicitly states that the Navajo were to be free from state law or exempt from state taxes. But the document is not to be read as an ordinary contract agreed upon by parties dealing at arms length with equal bargaining positions. We have had occasion in the past to describe the circumstances under which the agreement was reached. "At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos river in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promise to keep peace, this treaty 'set apart' for 'their permanent home' a portion of what had been their native country." *Williams* v. *Lee*, 358 U. S. 217, 221 (1959).

It is circumstances such as these which have led this Court in interpreting Indian treaties, to adopt the general rule that "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U. S. 363, 367 (1930). When this canon of construction is taken together with the tradition of Indian independence described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajo and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. It is thus unsurprising that this Court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo reservation. See *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U. S. 685, 687, 690 (1965); *Williams* v. *Lee*, *supra*, at 221–222 (1959).

Moreover, since the signing of the Navajo treaty, Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation.[13] Thus, when Arizona entered the Union, its entry was expressly conditioned on the promise that the State would "forever disclaim all right and title to . . . all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through and from the United States or any prior sovereignty, and that until

[13] "Congress has acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. . . . Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester* v. *Georgia* had denied." *Williams* v. *Lee*, 358 U. S. 217, 220–221 (1959) (footnote omitted).

the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the United States." Arizona Enabling Act, 36 Stat. 557, 569 (1910).[14]

Nor is the Arizona Enabling Act silent on the specific question of tax immunity. The Act expressly provides that "nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property *outside of an Indian reservation* owned or held by any Indian." *Id.*, at 570 (emphasis added). It is true, of course, that exemptions from tax laws should, as a general rule, be clearly expressed. But we have in the past construed language far more ambiguous than this as providing a tax exemption for Indians. See, *e. g.*, *Squire* v. *Capoeman*, 351 U. S. 1, 6 (1956), and we see no reason to give this language an especially crabbed or restrictive meaning.[15]

Indeed, Congress' intent to maintain the tax exempt status of reservation Indians is especially clear in light of the Buck Act, 4 U. S. C. § 104 *et seq.*, which provides comprehensive federal guidance for state taxation of those

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[14] This language is duplicated in Arizona's own constitution. See Ariz. Const., Art. 20, ¶ 4. It is also contained in the Enabling Acts of New Mexico and Utah, the other States in which the Navajo Reservation is located. See New Mexico Enabling Act, 36 Stat. 558–559; Utah Enabling Act, 28 Stat. 108.

[15] There is nothing in *Organized Village of Kake* v. *Egan*, 369 U. S. 60 (1962), to the contrary. In *Egan*, we held that "'absolute' federal jurisdiction is not invariably exclusive jurisdiction," and that this language in federal legislation did not preclude the exercise of residual state authority. See 369 U. S., at 68. But that holding came in the context of a decision concerning the fishing rights of *nonreservation* Indians. See 369 U. S., at 62. It did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians.

living within federal areas. Section 106 (a) of Title 4 grants to the States general authority to impose an income tax on residents of federal areas, but § 109 expressly provides that "Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed." To be sure, the language of the statute itself does not make clear whether the reference to "any Indian not otherwise taxed" was intended to apply to reservation Indians earning their income on the reservation. But the legislative history makes plain that this proviso was meant to except reservation Indians from coverage of the Buck Act, see S. Rep. No. 1625, 76th Cong., 3d Sess., 2, 4; 84 Cong. Rec. 10685 (1939), and this Court has so interpreted it. See *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U. S. 685, 691 n. 18 (1965). While the Buck Act itself cannot be read as an affirmative grant of tax exempt status to reservation Indians, it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event. Similarly, narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization.[14]

Finally, it should be noted that Congress has now provided a method whereby States may assume jurisdiction over reservation Indians. Title 25 U. S. C. § 1322 (a) grants the consent of the United States to States wishing to assume criminal and civil jurisdiction over reservation

[14] See, *e. g.*, 25 U. S. C. § 398 (congressional authorization for States to tax mineral production on unallotted tribal lands). Cf. 18 U. S. C. § 1161 (state liquor laws may be applicable within reservations); 25 U. S. C. § 231 (state health and education laws may be applicable within reservation).

Indians, and 25 U. S. C. § 1324 confers upon the States the right to disregard enabling acts which limit their authority over such Indians. But the Act expressly provides that the State must act "with the consent of the tribe occupying the particular Indian country," 25 U. S. C. § 1322 (a),[17] and must "appropriately amend [its] constitution or statutes." 25 U. S. C. § 1324. Once again, the Act cannot be read as expressly conferring tax immunity upon Indians. But we cannot believe that Congress would have required the consent of the Indians affected and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment. See *Kennerly* v. *District Court*, 400 U. S. 423 (1971).[18]

Arizona, of course, has neither amended its constitution to permit taxation of the Navajos nor secured the

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[17] As passed in 1953, Pub. L. 280, 67 Stat. 588, delegated civil and criminal jurisdiction over Indian reservations to certain States, although not to Arizona. See 18 U. S. C. § 1162; 28 U. S. C. § 1360. The original Act also provided a means whereby other States could assume jurisdiction over Indian reservations without the consent of the tribe affected. See 67 Stat. 590. However, in 1968, Congress passed the Indian Civil Rights Act which changed the prior procedure to require the consent of the Indians involved before a State was permitted to assume jurisdiction. See 25 U. S. C. § 1322 (a). Thus, had it wished to do so, Arizona could have unilaterally assumed jurisdiction over its portion of the Navajo Reservation at any point during the 15 years between 1953 and 1968. But although the State did pass narrow legislation purporting to require the enforcement of air and water pollution standards within reservations, see Ariz. Rev. Stat. (Cum. Supp.) § 36-1801, Ariz. Rev. Stat. (Cum. Supp.) § 36-1865, it declined to assume full responsibility for the Indians during the period when it had the opportunity to do so.

[18] We do not suggest that Arizona would necessarily be empowered to impose this tax had it followed the procedures outlined in 25 U. S. C. § 1322 *et seq.* Cf. 25 U. S. C. § 1322 (b). That question is not presently before us, and we express no views on it.

consent of the Indians affected. Indeed, a startling aspect of this case is that appellee apparently concedes that, in the absence of compliance with 25 U. S. C. § 1322 (a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians. See appellee's brief, at 24–26.[19] But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected. Cf. Transcript of oral argument, at 38–39. Unless the State is willing to defend the position that it may constitutionally administer its tax system altogther without judicial intervention, cf. *Ward* v. *Board of County Commissioners*, 253 U. S. 17 (1920), the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case.

IV

When Arizona's contentions are measured against these statutory imperatives, they are simply untenable. The State relies primarily upon language in *Williams* v. *Lee* stating that the test for determining the validity of state action is "whether [it] infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U. S., at 220. Since Arizona has attempted to tax individual Indians and not the tribe or reservation as such, it argues that it has not infringed on Indian rights of self-government.

In fact, we are far from convinced that when a State imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination. But even if the State's premise is accepted, we reject the suggestion that the *Williams* test was meant to apply in this situation. It must be remem-

[19] In light of our prior cases, appellee has no choice but to make this concession. See, *e. g.*, *Kennerly* v. *District Court*, *supra*; *United States* v. *Kagama*, 118 U. S. 375 (1886).

bered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. See also *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 75–76 (1962). In these situations, both the Tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

The problem posed by this case is completely different. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaties and statutes leave for the Federal Government and for the Indians themselves. Appellee cites us to no cases holding that this legislation may be ignored simply because tribal self-government has not been infringed.[20] On the contrary, this Court expressly rejected such a position only two years ago.[21] In *Kennerly* v. *District Court*, 400 U. S. 423 (1971), the Blackfeet Indian Tribe had voted to make state jurisdiction concurrent within the reservation. Although the State had not complied with the procedural prerequisites for the assumption of jurisdiction, it argued that it was nonetheless entitled to extend its laws to the reservation since such action was obviously consistent with the wishes of the Tribe and, therefore, with tribal self-government. But we held that the *Wil-*

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[20] *Organized Village of Kake* v. *Egan*, 369 U. S. 60 (1962), is not such a case. See n. 15, *supra*.

[21] Indeed, the position was expressly rejected in *Williams*, itself, upon which appellee so heavily relies. *Williams* held that "*absent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U. S., at 220 (emphasis added).

liams rule was inapplicable and that "[t]he unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction." 400 U. S., at 427. If Montana may not assume jurisdiction over the Blackfeet by simple legislation even when the Tribe itself agrees to be bound by state law, it surely follows that Arizona may not assume such jurisdiction in the absence of tribal agreement.

Nor is the State's attempted distinction between taxes on land and on income availing. Indeed, it is somewhat surprising that the State adheres to this distinction in light of our decision in *Warren Trading Post Co.* v. *Arizona Tax Commission, supra,* wherein we invalidated an *income tax* which Arizona had attempted to impose within the Navajo Reservation. However relevant the land-income distinction may be in other contexts, it is plainly irrelevant when, as here, the tax is resisted because the State is totally lacking in jurisdiction over both the people and the lands it seeks to tax. In such a situation, the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself.

Finally, we cannot accept the notion that it is irrelevant "whether the . . . state income tax infringes on [appellant's] rights as an individual Navajo Indian," as the State Court of Appeals maintained. *McClanahan* v. *State Tax Commission,* 14 Ariz. App. 452, 454, 484 P. 2d 221, 223 (1970). To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights. This Court has therefore held that "the question has always been whether the state action infringed on the right of *reservation Indians* to make their own laws and be ruled by them." *Williams* v. *Lee, supra,* at 220 (emphasis added). In

this case, appellant's rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose. Accordingly, the judgment of the court below must be

Reversed.